In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 397

LESLY COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported. The opinion of the district court on the motion to suppress is reported at 241 F. Supp. 269.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1967. A petition for rehearing was denied on June 20, 1967. The petition for a writ of certiorari was filed on July 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly denied petitioner's motion to suppress without a hearing.

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2. Whether the instructions on intent were erroneous.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of California on two counts charging interstate transportation of wagers and wagering information, in violation of 18 U.S.C. 1084, and was ordered to pay fines of $2500 on each count. The court of appeals affirmed (Pet. App. B).

Of the two counts on which he was convicted, Count 7 charged that during the football season of 1962 (September 16 to December 15) petitioner unlawfully used the telephone to transmit wagering information relating to football games from Las Vegas to San Francisco; Count 9 charged that on or about September 25, 1962, he unlawfully used the telephone to transmit a wager on the Sonny Liston-Floyd Patterson fight from Las Vegas to San Francisco (R. 5, 6). Petitioner does not challenge the sufficiency of the evidence establishing these charges. With respect to Count 7, the government's evidence showed that one Adolph Schuman placed several bets with petitioner during the 1962 football season by telephoning the wagers from San Francisco to Las Vegas, and that, prior to placing those bets, Schuman had regularly telephoned petitioner in order to receive information concerning the odds on the particular games (Tr. 95, 194–196, 198–199, 258–259, 273–274). With respect to Count 9, Schuman testified that he had placed a wager on the Liston-Patterson fight by telephoning peti-

tioner at Las Vegas from San Francisco (Tr. 209, 274–275, 276–277). Other evidence and testimony showed that petitioner regularly accepted wagers over the telephone without making any inquiry as to the origination of the telephone call, and would accept wagers notwithstanding the fact that the caller would identify himself as being an out-of-state wagerer (Tr. 34, 80).

ARGUMENT

1. On January 23, 1964, prior to trial, petitioner filed a motion to suppress evidence (the nature of which was not defined) alleging generally that evidence was obtained in violation of his constitutional rights (R. 11–13). The motion papers consisted only of unsubstantiated charges that the government had tampered with his mail and had intercepted his telephone conversations. In response to petitioner's motion for leave to take depositions in connection with the motion to suppress, the government filed motion papers and an affidavit of the Assistant United States Attorney in which the government categorically denied any wiretapping or interception of mail beyond that of an ordinary and routine "mail watch". The government urged that the motion to suppress be denied without a hearing on the ground that there were no contested issues of fact. The government also filed a supplemental memorandum attached to which were affidavits of three postal authorities in which it was stated that the "mail watch" consisted only of recording from the outside of the envelope the information relating to the names of the addressee and

sender, the return address, the postmark, and the class of mail (R. 47–48, 49–56, 52). Petitioner's attorney, Richard Foster, then filed an affidavit in which he stated (R. 57–58):

* * * * *

> 1. THAT he (Foster) is one of the attorneys representing the defendant LES COHEN, and is familiar with the files, records, facts and circumstances surrounding the case.
>
> 2. THAT on April 22, 1963, the firm of LEWIS & FOSTER mailed to the defendant, LES COHEN, a letter containing confidential legal advice and this letter presumedly was intercepted by agents of the Internal Revenue Service in connection with the investigation of this defendant.
>
> 3. THAT in connection with his investigation of this case, your client [sic] interviewed numerous individuals who had been interviewed by agents of the Internal Revenue Service. The individuals interviewed were asked questions by the agents of the Internal Revenue Service concerning correspondence and telephone calls made to defendant, LES COHEN. The content of these questions, the Internal Revenue Service agents must have been familiar with the content of correspondence and with the content of the telephone conversations to which the questions referred.

On April 21, 1965, the district court denied the motion to suppress without a hearing, finding that no issues of fact were raised in light of petitioner's conclusionary allegations, and the government's categorical denial of the use of a wiretap or interception

of the mail. *United States* v. *Cohen,* 241 F. Supp. 269 (N.D. California).

In these circumstances, there was no error in the ruling of the district court denying the motion to suppress without a hearing. There is not a scintilla of evidence supporting the charge that Internal Revenue agents intercepted a confidential letter sent by Foster to petitioner. The government did admit to a "mail watch", but this process, which consisted of taking the information from the outside of the envelopes and did not impede the delivery of the mail, violated no constitutional rights of petitioner. See *United States* v. *Costello,* 255 F. 2d 876 (C.A. 2); *United States* v. *Schwartz,* 283 F. 2d 107 (C.A. 3); *Ex parte Jackson,* 96 U.S. 727. *Lamont* v. *Postmaster General,* 381 U.S. 301, upon which petitioner primarily relies (Pet. 5–6) is inapplicable to the instant case since a "mail watch" does not present a comparable inhibition upon the exercise of First Amendment rights.

Similarly, no facts were alleged—aside from the conjecture of petitioner's attorney—supporting the charge that government agents had intercepted petitioner's telephone conversations. The government categorically denied any wiretapping with respect to petitioner. The attorney's affidavit stated only that certain questions allegedly asked of prospective witnesses by government agents had suggested (to him) that those agents had engaged in some form of illegal monitoring. The questions allegedly asked by the agents were not set forth in the supporting affidavit,

nor were there any other facts set forth upon which the district court could have made an independent appraisal of the necessity of a pre-trial hearing. In the circumstances, it is obvious that petitioner was in fact seeking, in the guise of a motion to suppress, an opportunity to conduct an exploratory search to which he was not entitled. See *United States* v. *Casanova,* 213 F. Supp. 654, 656–657 (S.D.N.Y.); *United States* v. *Pardo-Bolland,* 229 F. Supp. 473, 475 (S.D.N.Y.), affirmed on other grounds, 348 F. 2d 316 (C.A. 2), certiorari denied, 382 U.S. 944.

In accordance with the policy set forth in the government's Supplemental Memorandum to this Court in *Schipani* v. *United States,* (No. 504, O.T. 1966), a review of petitioner's prosecution was undertaken. That review disclosed no interception of petitioner's mail or telephone conversations.

2. In the section of the charge relating to intent, the court instructed the jury (Tr. 554–555; Pet. 4):

> As a general rule, it is reasonable to infer that a person ordinarily intends all the natural consequences of his acts knowingly done or knowingly admitted. So unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing under like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Petitioner's contention that that instruction *per se* requires reversal is without merit.[1] That instruction was immediately followed by the instruction (Tr. 555):

> Unless otherwise instructed to return on the issue as to intent, the jury is entitled to consider any statement made, act done or omitted by the accused, all facts and circumstances in evidence in the case which may aid in the determination of his state of mind. In this case, the burden is on the Government, as I have said before, to prove that the defendant knew that the use of the wire communication facilities for the transmission in interstate commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event was contrary to law.

Elsewhere, the court charged (Tr. 553):

> The burden is not on the defendant to prove his innocence, but on the Government to prove his guilt. In order to find the defendant guilty, you must find beyond a reasonable doubt that he knew that the alleged wagerers charged in the indictment were calling from the Northern District of California.

Read as a whole, the instructions simply pointed out that if the jury found that petitioner had known that he was transmitting wagers and wagering information on the telephone to out-of-state callers, and had

[1] When requesting exceptions to the charge, petitioner's counsel stated that the instruction was ordinarily proper, but that it was error to so charge in the instant case. He did not elaborate as to why the instant case merited a different consideration.

done so knowing it to be contrary to law, they could then infer specific intent from that conduct. There is obviously nothing improper about such an inference. The challenged instruction did not have the effect of telling the jury that they could infer specific intent from the mere act of transmitting the wagers and wagering information alone.[2] It properly pointed out that specific intent could be inferred from this conduct if, and only if, the jury first found that petitioner had known that he was dealing with out-of-state callers, and had known such conduct to be contrary to law. There was thus no error in the charge.

[2] Petitioner misinterprets the cases on which he relies. In *United States* v. *Barash*, 365 F. 2d 395 (C.A. 2), the instructions read as a whole had the effect of telling the jury that they could infer specific intent in a bribery case from the mere act of payment to a public official; and in *Mann* v. *United States*, 319 F. 2d 404 (C.A. 5), the instructions read as a whole had the effect of telling the jury that they could infer specific intent in a tax evasion case from the mere act of filing an understated income tax return. In each of the two cases, the conduct—*i.e.*, payment to a public official and filing of an understated return—was intrinsically ambiguous, since the payment to a public official might have been for purposes other than a bribe, and the filing of an understated income tax return might have been due to negligence. No similar ambiguity exists here.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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